COTS Software Licensing

Foundational Topics Overview

September 2015

Agenda

DAY 1 MORNING – FOUNDATIONAL TOPICS

- ❑ Welcome & Agenda Review
- ❑ Introductions
- ❑ Introduction to DoD ESI
- ❑ Information Technology (IT) Industry Overview & Ecosystem
- ❑ Intellectual Property (IP) Introductory Concepts
- ❑ Privity / Software Publisher & Reseller Contracting Methods
- ❑ Software Publisher Products and Services & Source Code Escrow

Agenda

DAY 1
AFTERNOON –

- ❑ Preparing for the Acquisition – Team Approach
- ❑ Preparing for Negotiations – Strategic Guidance

CORE ELEMENTS OF A SOFTWARE LICENSE AGREEMENT

- ❑ License Grant

Agenda

DAY 2
CORE ELEMENTS OF A SOFTWARE LICENSE AGREEMENT (cont.)

- ❑ Pricing and License Models
- ❑ Warranty
- ❑ Maintenance and Support
- ❑ General Provisions
- ❑ Panel Discussion / Open Topics from the Class & Parking Lot
- ❑ Exercise

DoD ESI Team / Instructor Introductions

Suzi Ellison | *Enterprise Agreements Manager*

Over 25 years of engineering, acquisition and leadership experience with U.S. Navy combat systems and subsystems. Navy Lead SPM for DoD ESI. Program Manager for the IT Umbrella Program. Experienced in system acquisition and life cycle planning of Navy programs including all phases of program management, budget preparation and execution.

Dee Wardle | *Software Licensing SME, Contract Support to DoD ESI*

30+ year expert in software licensing for DoD Services and Agencies mostly with the U.S. Army. Former Software Division Chief for the Computer Hardware Enterprise Software & Solutions (CHESS) Program and Program Executive Office Enterprise Information Systems (PEO EIS). Served Federal SmartBUY Programs and the DoD ESI Program.

John Zettler | *Pricing & Contract SME, Contract Support to DoD ESI*

30+ years in government contract costing, pricing, and program financial management, with particular expertise in IT services and enterprise software acquisition. Six years at Oracle Federal and two years at Informix Federal. Pricing, Business Approval, and Contracts experience across six different vertical industries.

DoD ESI Team / Instructor Introductions

Dan McMullan | *Acquisition Planning*

Lead - Contract Support to DoD ESI

10 years military service with USMC;
15 years with DON as contracting officer specializing in IT acquisition. Supported DoD ESI since 2008. BuySide principal since July 2014.

Time Management Guidelines

- Many topics to cover in short amount of time
- We strive to stay on time
- We encourage questions and interactivity
- Recognize that fellow students have different roles, level of experience, and interests
- Time Czar will announce cut off points

Off-topic or abundance of questions can be handled via:

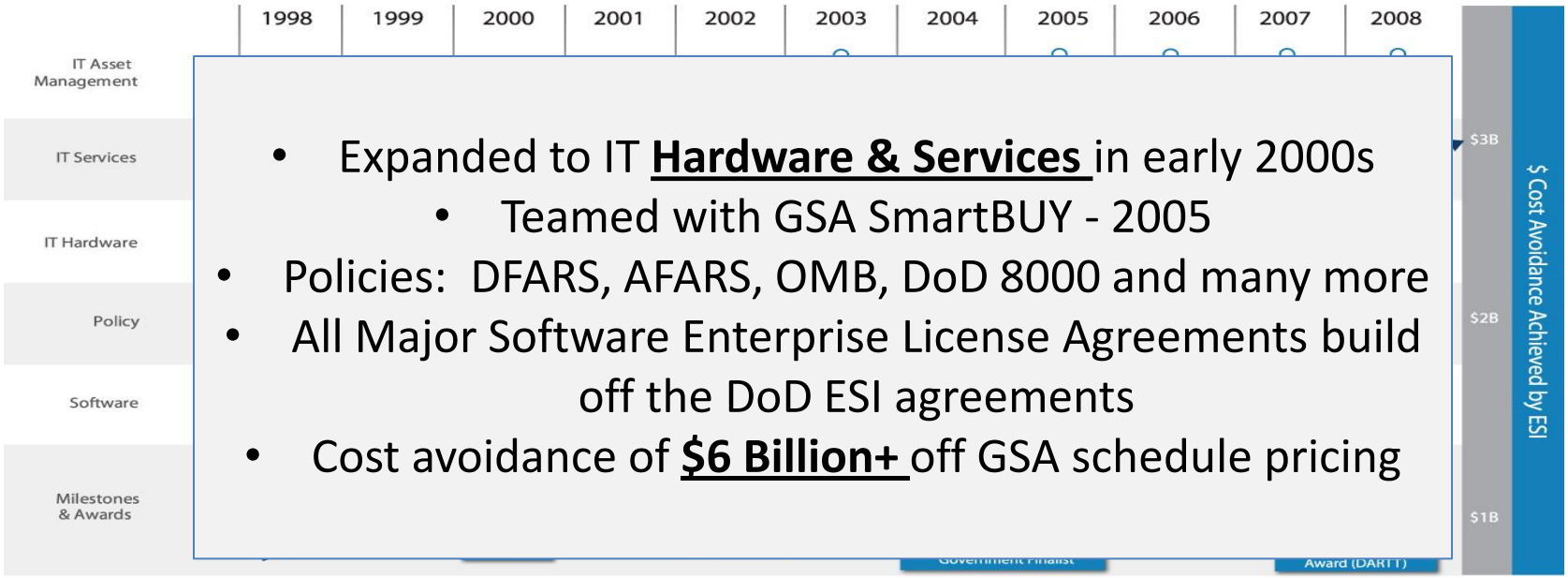
- *Defer to Future Section*
- *Parking Lot > Open Time*
- *Defer to Panel Discussion*
- *After Class on Day 1*
- *Follow-up Conference Call*
- *Webinar Topic*
- *Future Workshop on Key Topic*

Introduction to the DoD Enterprise Software Initiative (ESI)

Prepared by DoD ESI | 2015

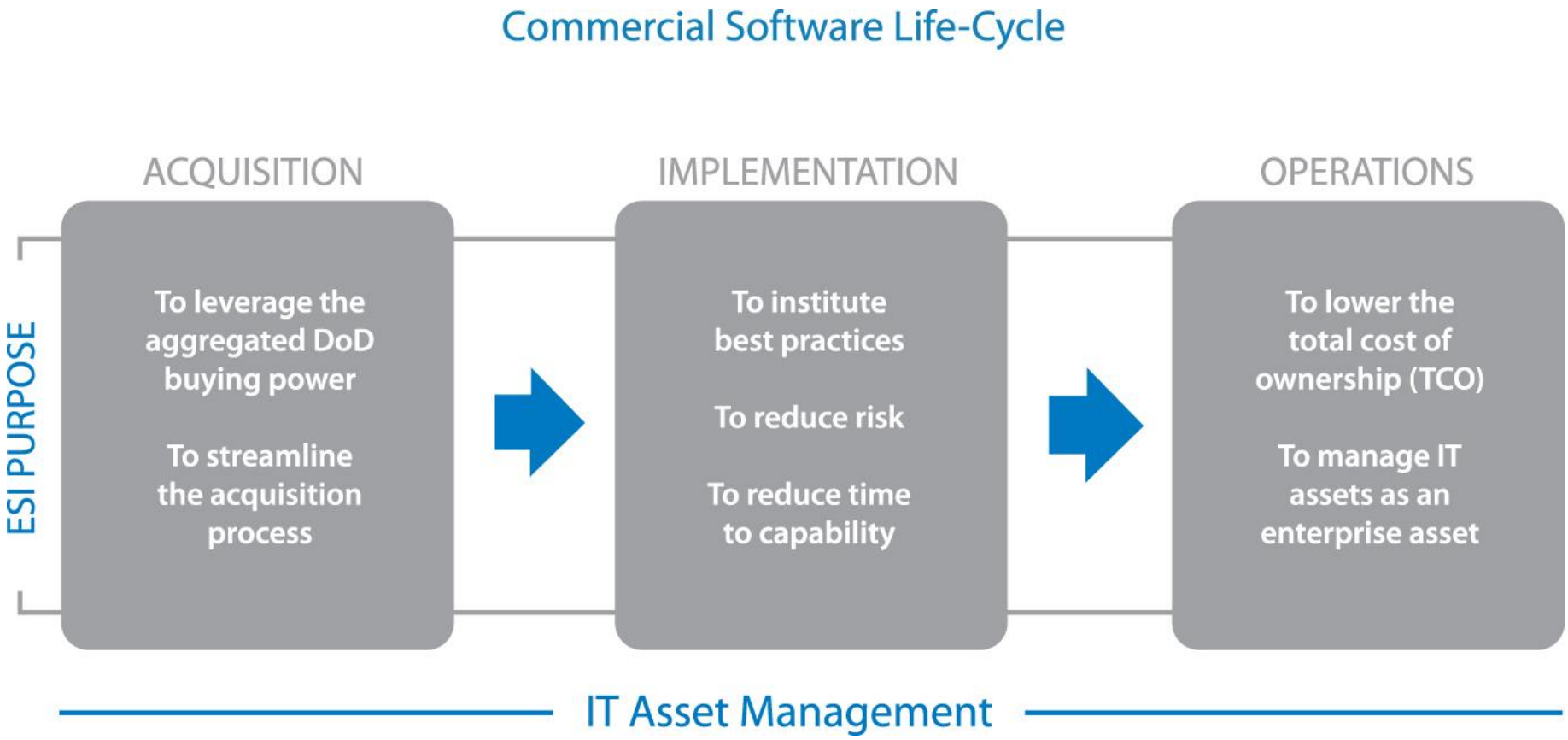
DoD ESI Key Introductory Points

- Formed in **1998** by DoD CIOs / Oversight by DoD CIO
- Serve as the **central group of subject matter experts** to negotiate with software publishers and their resellers on behalf of the DoD
- Staffed with **software product managers** from across the DoD services with specialization in a particular software company or product category



- Expanded to IT **Hardware & Services** in early 2000s
- Teamed with GSA SmartBUY - 2005
- Policies: DFARS, AFARS, OMB, DoD 8000 and many more
- All Major Software Enterprise License Agreements build off the DoD ESI agreements
- Cost avoidance of **$6 Billion+** off GSA schedule pricing

DoD ESI's Mission



Terms & Conditions

- Software Licenses
- Maintenance & Support
- Integration Services
- Cloud/SaaS

Market Research

- Industry Knowledge
- Trends in Technology
- Product Uniformity
- License Models

Training

- Classroom
- eLearning
- Webinars
- Workshops

DoD ESI

Stakeholder Outreach

- Strategic Communication
- Awareness
- Education
- Sponsorship

Tools

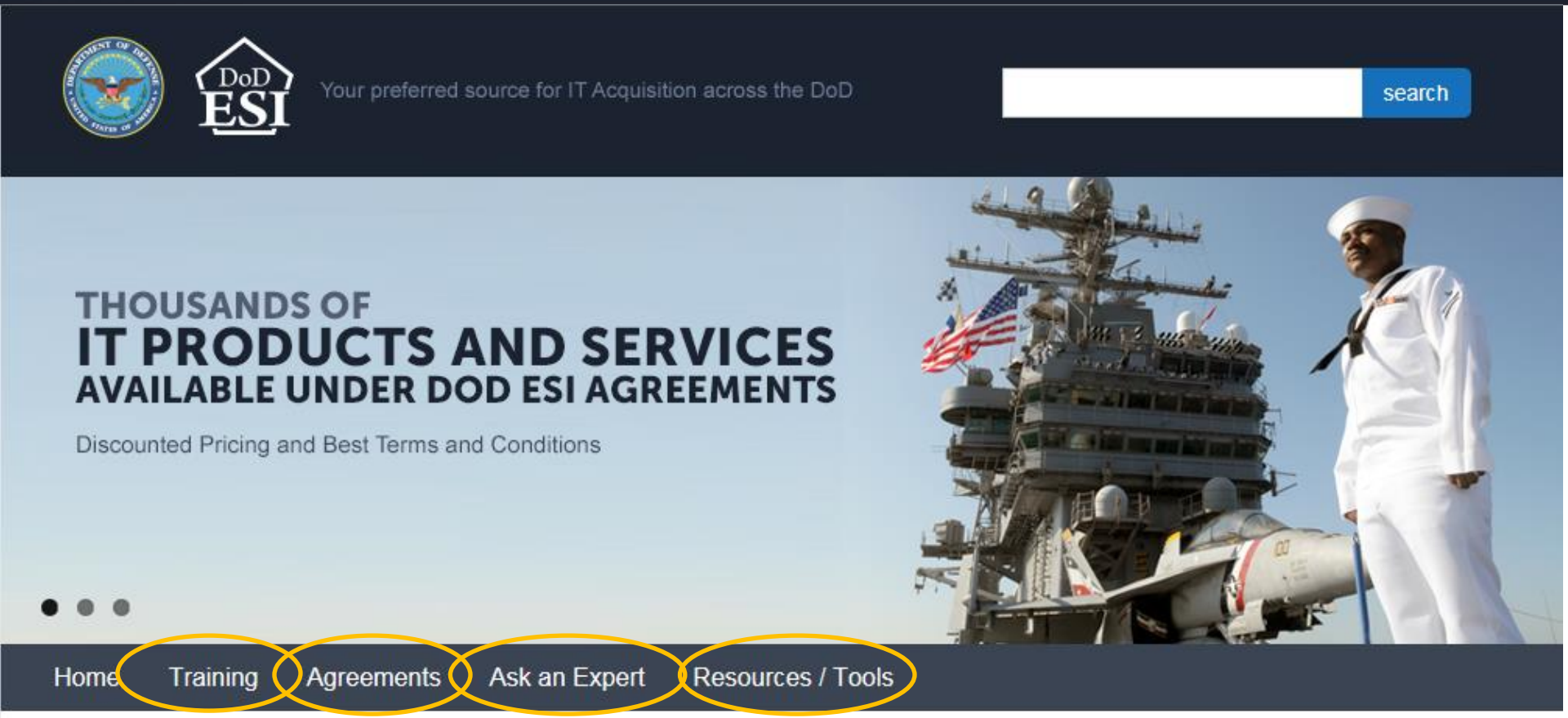
- White Papers
- Checklists
- Web Toolkits
- Templates

Lessons Learned

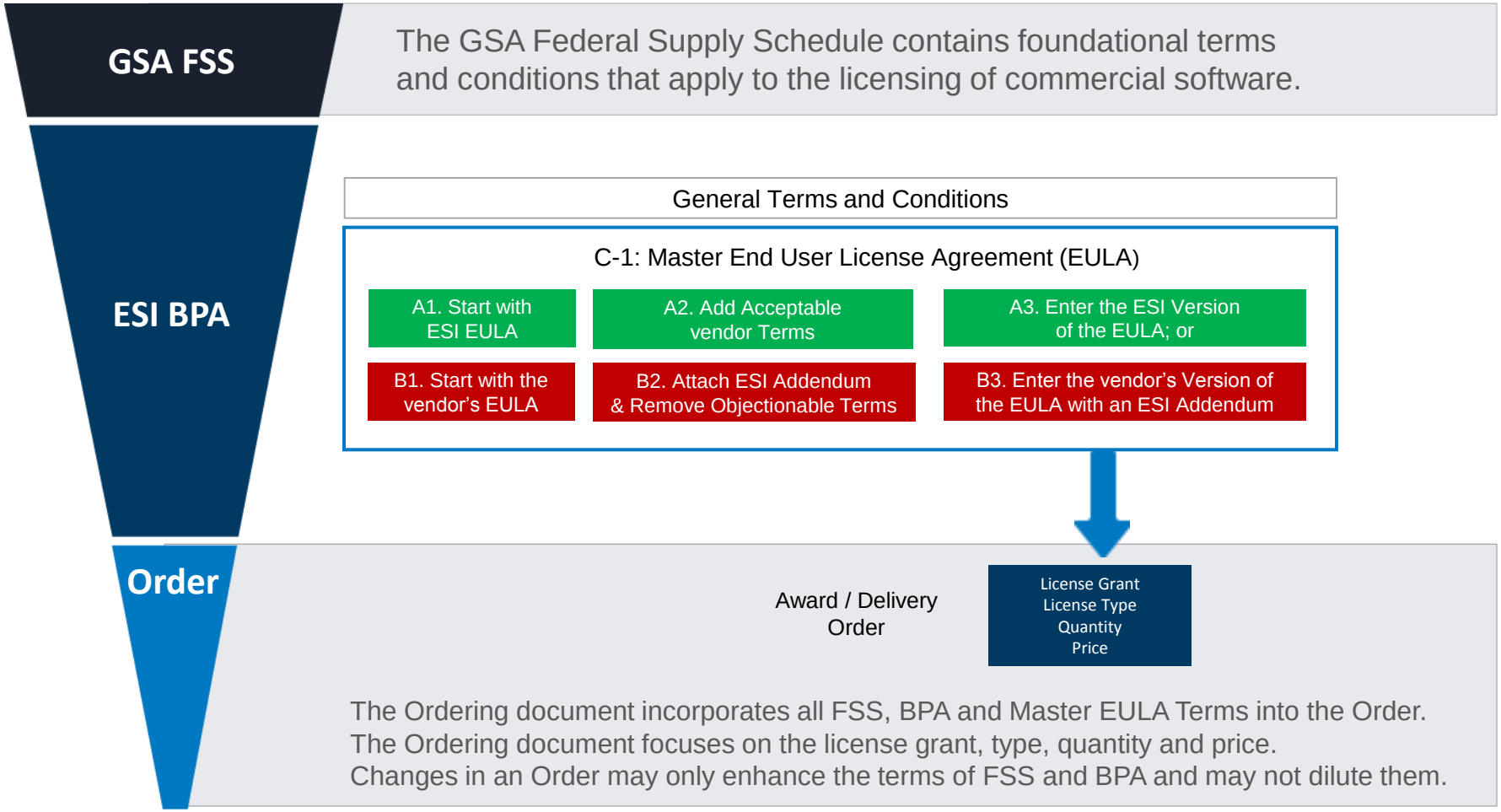
- Best Practices
- Knowledge Sharing
- IT Asset Visibility
- SPM Support

Pricing

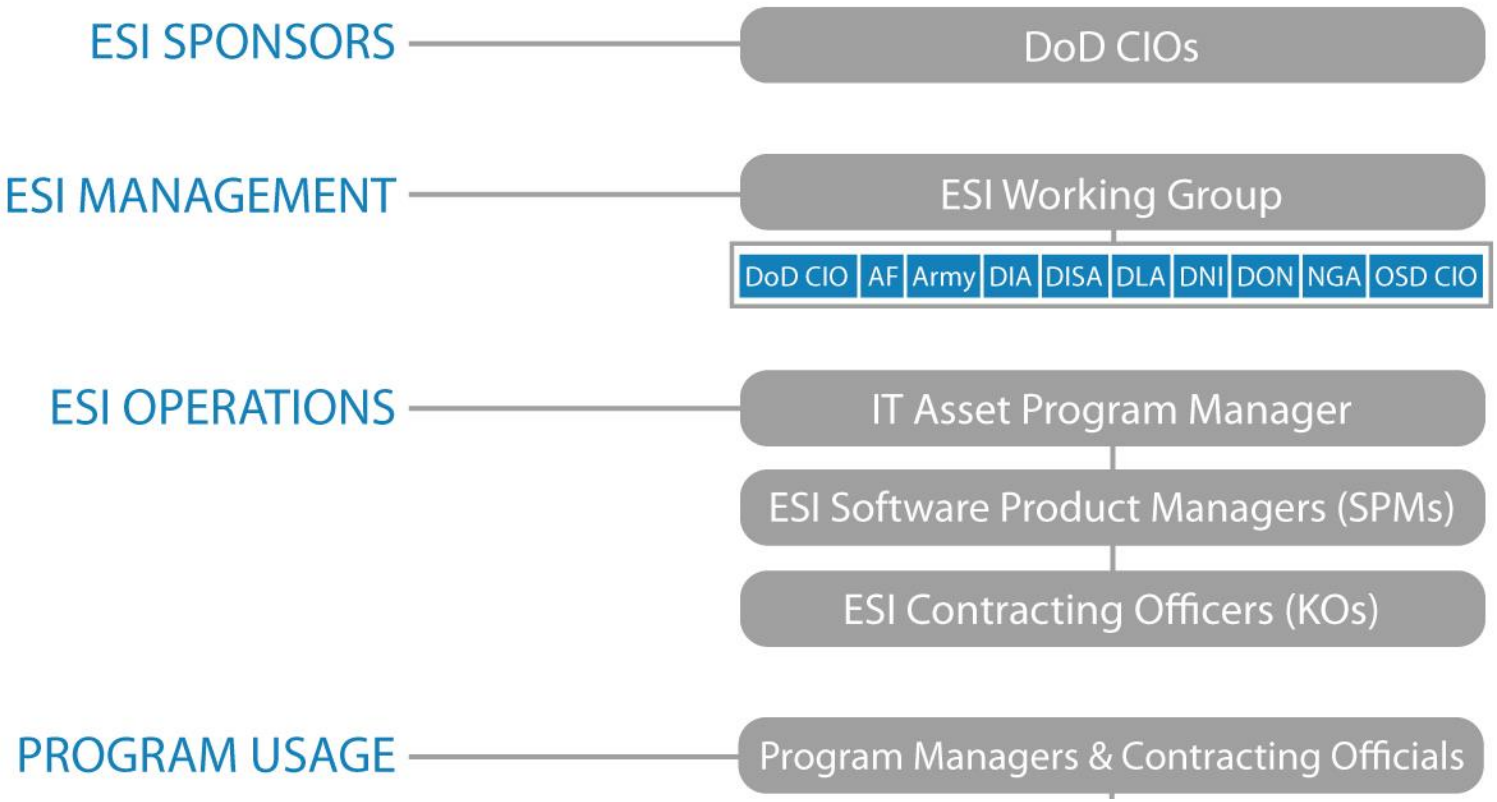
- Benchmarking
- Best Value Toolkit
- TCO Tools
- Portal


DoD ESI
Your preferred source for IT Acquisition across the DoD
search
THOUSANDS OF
IT PRODUCTS AND SERVICES
AVAILABLE UNDER DOD ESI AGREEMENTS
Discounted Pricing and Best Terms and Conditions
Home
Training
Agreements
Ask an Expert
Resources / Tools
New Website Launched
January 30, 2015
This notice is to inform our users that you have reached our new ESI website with improved functionality and a new look. You may find that some items and information may be missing, and we are ...
Featured News
CHIPS Magazine Mobile App Now Available
January 30, 2015
The CHIPS magazine mobile app for the Android and iOS operating systems is now available. The app is designed to provide users streamlined access to the latest articles and the ability to tag ...

Contractual Architecture Using GSA FSS and DoD ESI BPA

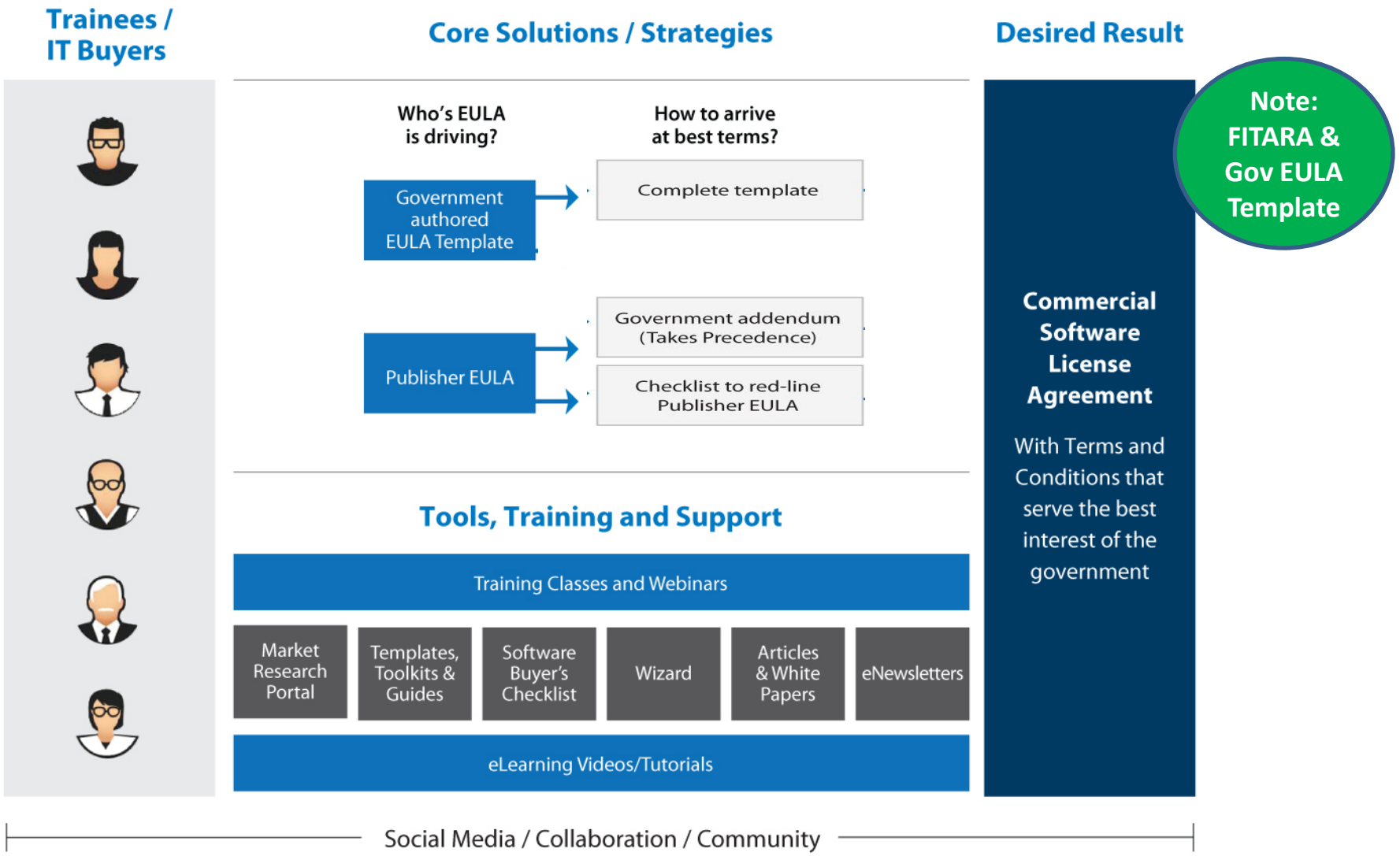


Organizational Structure



If you'd like to see a product or service added to the catalog of ESI BPAs, please contact DoD ESI Co-Chair

Training Strategy for DoD ESI



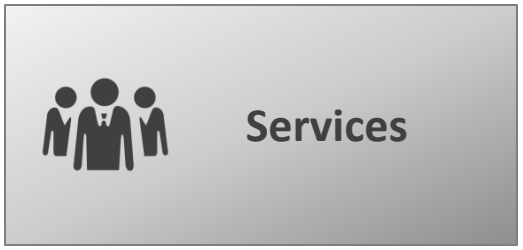
FOUNDATIONAL CONCEPTS
(Before Diving into the Contractual Impacts)

Prepared by DoD ESI | 2015

1.0 The IT Industry

Prepared by DoD ESI | 2015

Overview: Industry Overview / Spend Analysis



	Global Spending (Gartner Outlook)*		
2013	$809B**	$300B	$922B
2014	$840B	$320B	$963B
% '14	39%	15%	46%

	Federal Government Spending (est. using same % as Global Spending)***		
2014	$32B	$13B	$37B
% '14	39%	15%	46%

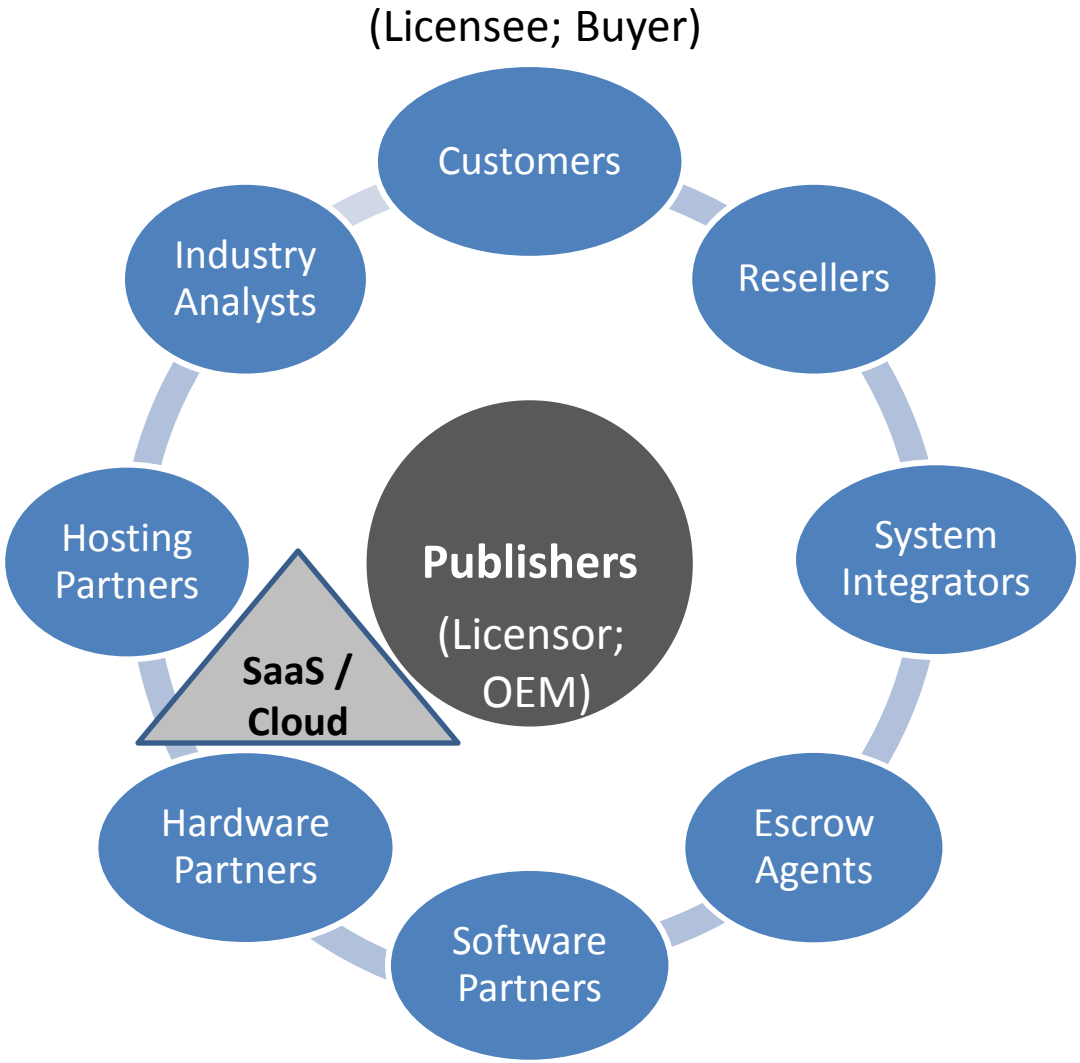
* *Does not Include Telecommunications Spending*

** *Includes Devices and Data Center Spending*

*** *Fed IT Spending ($82B in 2014) expected to decrease by 2-3% per year next few years*

Overview: Industry Overview / Ecosystem

The Key Players & Roles



2.0 Intellectual Property

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Overview: Intellectual Property – Protection Methods

Four Ways to Protect IP

Legal Protection

Patents
protect rights for inventions, up to 20 years.

Trademarks
protect words, names, symbols for as long as they are being used in business.

Copyrights
protect works of authorship *(e.g. writing, music, art, software)* tangibly expressed.

Trade Secrets
protect competitive advantages.

Software Industry Examples

Software algorithms	Logos, icons, corporate name	Source code, screen layouts	Customer lists

Overview: Intellectual Property Protection Methods for Software

Publisher Product Development / R & D

Source Code
(Human Readable – Secret Recipe)

Conversion

Object Code (Machine Readable)

Physically Protected

Licensed Software Version

Examples of Source Code & Object Code

Import.javax.servlet.http.Http.Servlet.
Request;

- **Binary code**

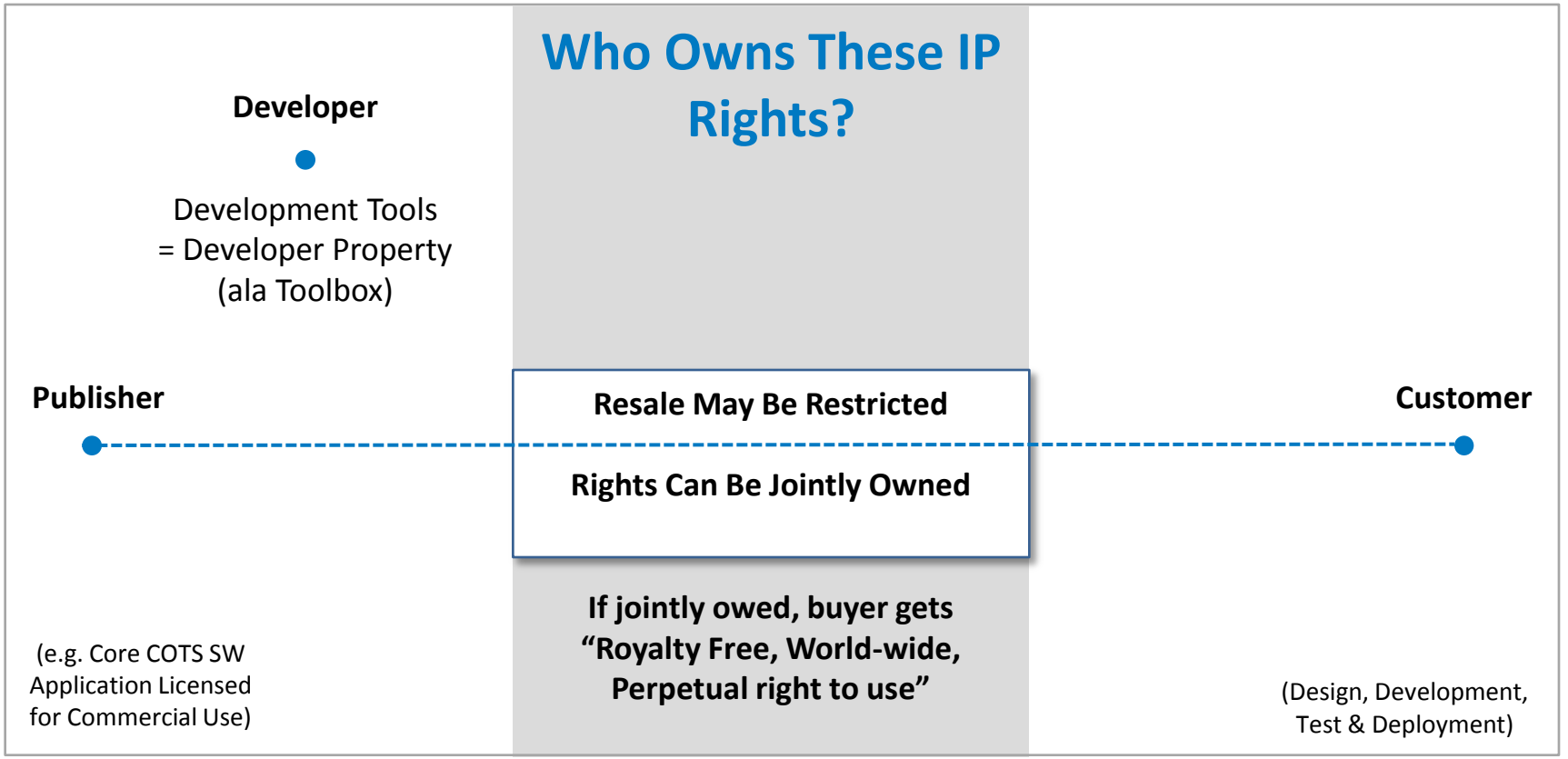
01000010011001010010000001110011
01110101011100100110001

- **Binary opened in terminal output**

^@^@^@^@^@<BC><BB><FC><^@^
@^@^@^@^@^@^@^@^@^@^@^@^@
^@^@^@META-INF/PK^C^D

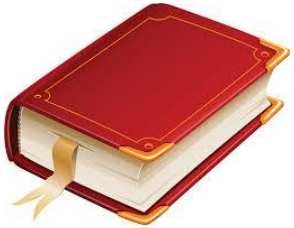
Overview: Intellectual Property - Ownership Rights

THE GOVERNMENT ALWAYS OWNS ITS DATA



Overview: Intellectual Property – Derivative Works Sample

Book to screenplay example



Book → **Screenplay** → **Movie**

Nothing Lasts Forever Roderick Thorp	Screenplay by Lawrence Gordon Joel Silver	Produced by Steven E. de Souza & Jeb Stuart Extra credit – Name the Movie!!

Derivative Work: Requires original author's approval to write a screenplay based on the book or to make a movie based on her book.

- Would a movie about sharks terrorizing swimmers infringe on the IP in Jaws?
- Would a restaurant named Mickey Dee's with yellow arches infringe on McDonald's IP?
- What makes one piece of work a derivative of another?
- How do these examples work in the software industry?

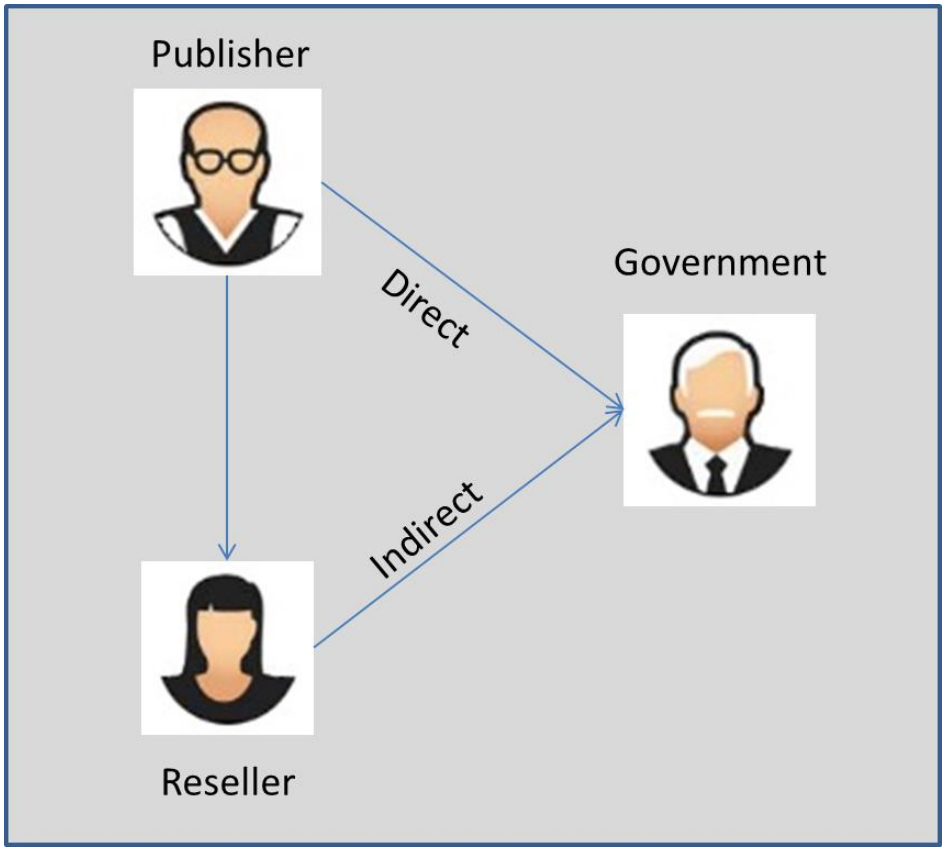
3.0 Publisher & Reseller Contracting Methods

Prepared by DoD ESI | 2015

Contracting with a Publisher and/or its Resellers

Who is authorizing the use of the software?

With whom are you entering a contract?



Privity of Contract (*defined*)

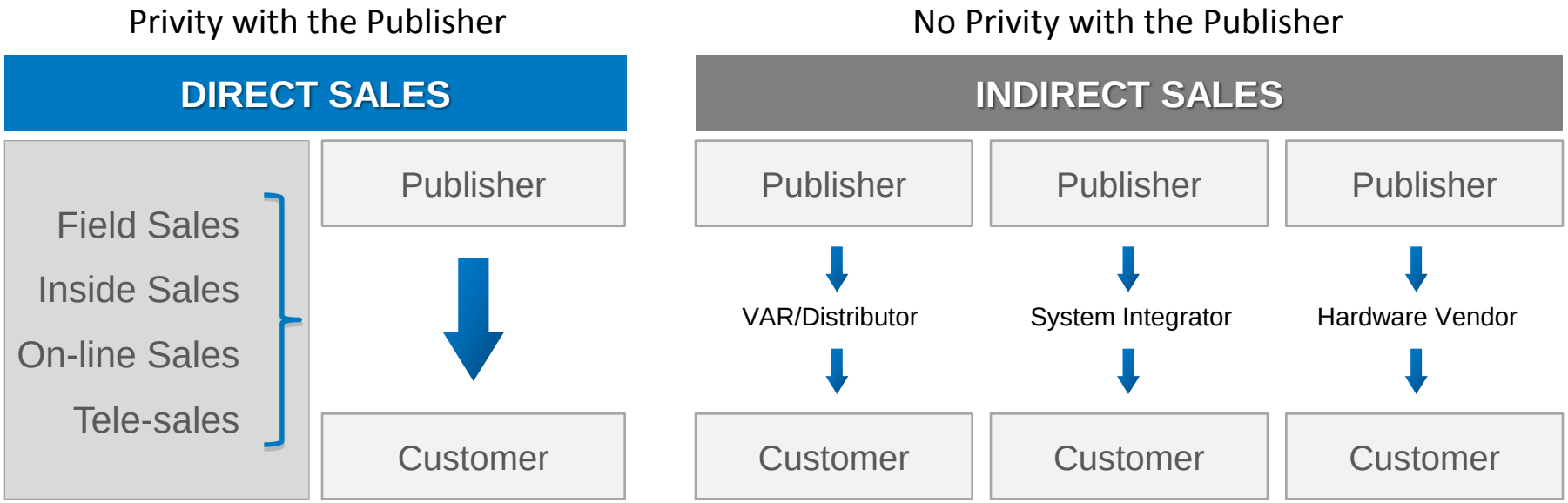
1. A relationship between two parties that is recognized by law.

2. A connection or bond between parties to a particular transaction.

3. The relationship that exists between two or more parties to an agreement.

Contract law requires "privity of contract" between parties to enable either of them to enforce contract promises against the other party.

Contracting Methods & Impacts on Privity of Contract

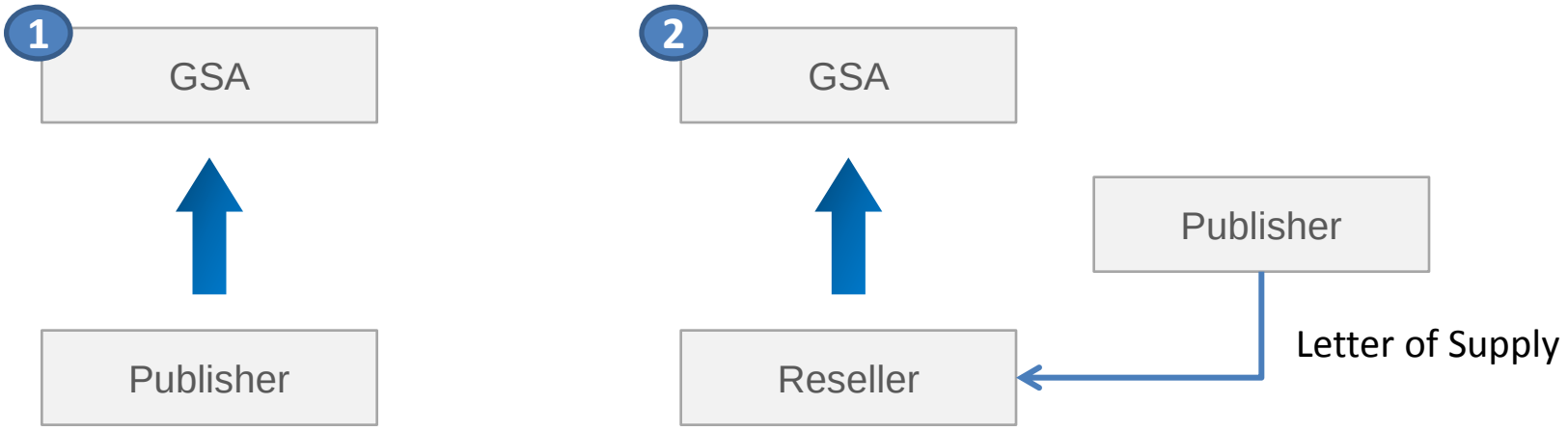


Examples of Contract Provisions Where Privity Matters:

- License Grants
- Transferability of Licenses
- Source Code Escrow
- Ownership of Derivative Works
- Warranty
- Level 3 Support
- IP Indemnification

Publisher Model / Contracting Methods

GSA's Approach to Publishers, Resellers & Privity



GSA deals directly with Publishers when possible, thereby creating privity with them.

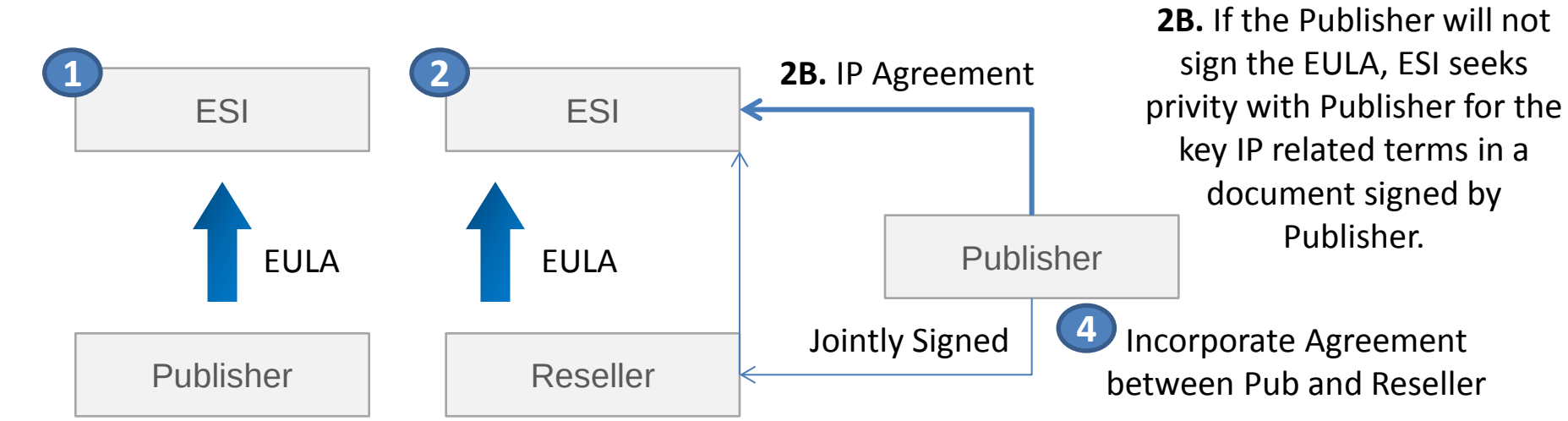
GSA also deals directly with Resellers and often accepts letters of supply as a means of tying Reseller promises to Publishers.

GSA Focus: FAR, Statutory, Regulatory (non-business terms)

Since GSA does not consider most of the IP related Ts and Cs to be within their scope of responsibility, the FSS agreements with Publishers do not address those topics – or the Publisher ensures IP related Ts and Cs in FSS agreements are favorable to Publisher.

Publisher Model / Contracting Methods

ESI's Approach to Publishers, Resellers & Privity



2B. If the Publisher will not sign the EULA, ESI seeks privity with Publisher for the key IP related terms in a document signed by Publisher.

1. ESI seeks to have Publishers sign EULAs to ensure direct privity for all promises in EULAs.

2. ESI enters BPAs directly with Resellers.

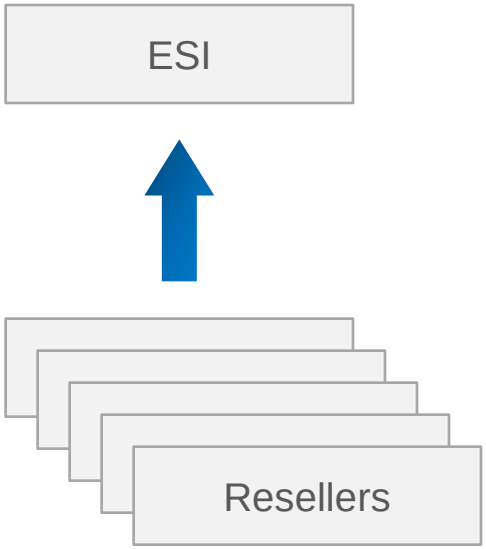
2A. ESI seeks to have the Publisher sign along with the Reseller.

4. If Publisher will not sign a document creating privity for IP issues, ESI seeks to incorporate the Publisher agreement with its Resellers into the ESI EULA with the Resellers.

Obtain a copy of the agreement between the Publisher and its Resellers where Publisher authorizes Resellers to sell licenses, extend warranties, etc. Attach that agreement to the EULA with the Reseller and add a paragraph that incorporates it into the EULA. This is reasonable evidence of Publisher's intentions.

Publisher Model / Contracting Methods

Competition Among Resellers



When a single brand is selected and a J&A is obtained, competition is achieved by soliciting bids from multiple Resellers.

This competition is far less advantageous to the government than competition among Publishers.

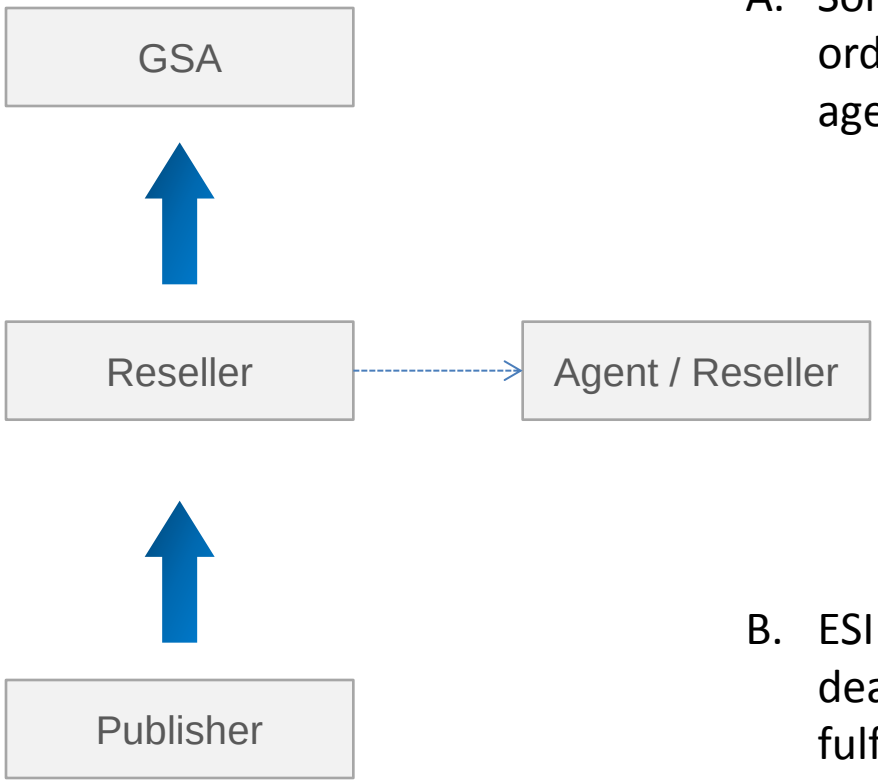
Competition Among Publishers

Publisher 1 VS. Publisher 2 VS. Publisher 3

Publisher Model / Contracting Methods

Agents and Dealers

Why are resellers used?
1. Federal Perspective
2. Sellers' Perspective



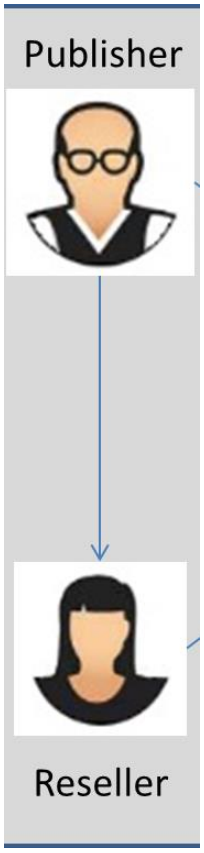
A. Some Resellers use agents or dealers to fulfill orders and request that the government pay the agent or dealer.

This introduces two potential problems:

1. Privity is further removed from the Publisher
2. The agent or dealer may not have a contract with the government or a CAGE code to enable payment.

B. ESI seeks to avoid dealing with agents or dealers. Resellers might use them for order fulfillment, but the Reseller (or preferably the Publisher) must remain responsible for promises in the EULA and must take payment.

Reseller & Publisher Relations- Pricing / Discounts



Publishers may:

- Offer **same discounts to all resellers**.
- Be consistent and **level the playing field**.
- **Reward** the Reseller with the **best sales** execution.
- Offer **volume discounts** to top resellers.

Resellers usually:

- **Compete on their "pass-through"**
- **Get additional discounts on larger deals as "one-off"** deals.
- Get exclusive treatment when they **"find" the sale**.
- Get same price from Publisher in response to RFP.

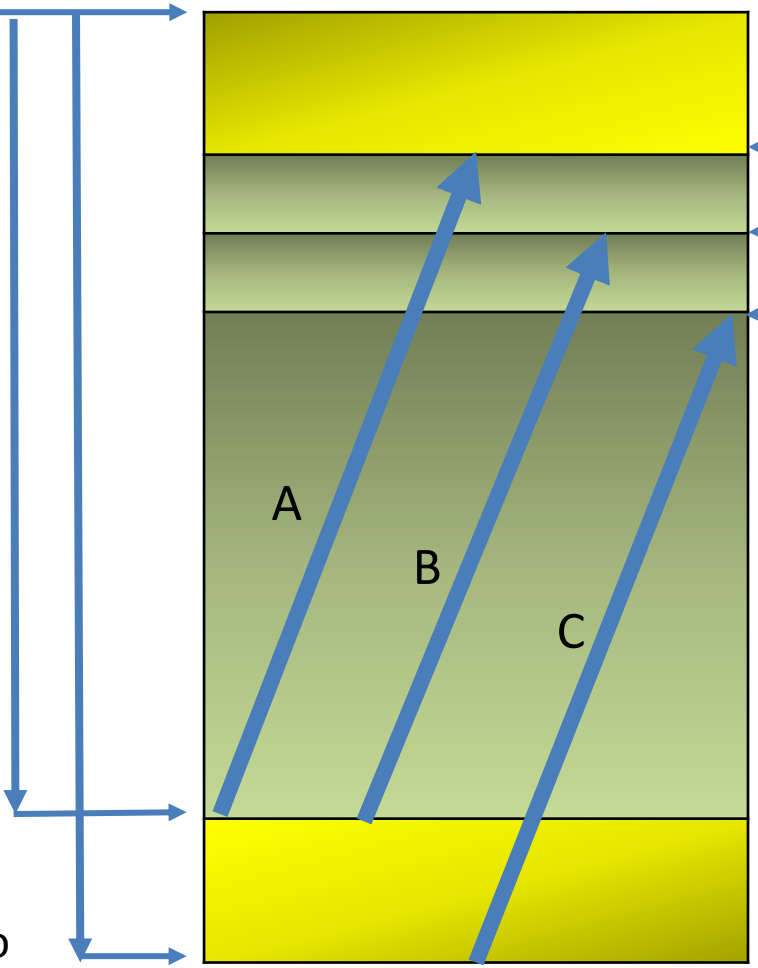
Example of Publisher Discount to Reseller & Reseller Pricing to Customers

1. List Price from Publisher = $10,000

2. Discounts are extended by Publisher to Resellers A,B & C

3. Standard discount to Resellers A & B = 40% so price to A & B = $6,000

4. Volume Discount to Reseller C = 45% so price to C = $5,500



4. Reseller Mark-ups & Prices

A 20% on $6,000 = $7,200

B 15% on $6,000 = $6,900

C 20% on $5,500 = $6,600

Conclusion:

Reseller C is able to earn a 20% mark-up and win with low price because of a volume discount from the Publisher.

Revenue Recognition – a Frequently Used Objection

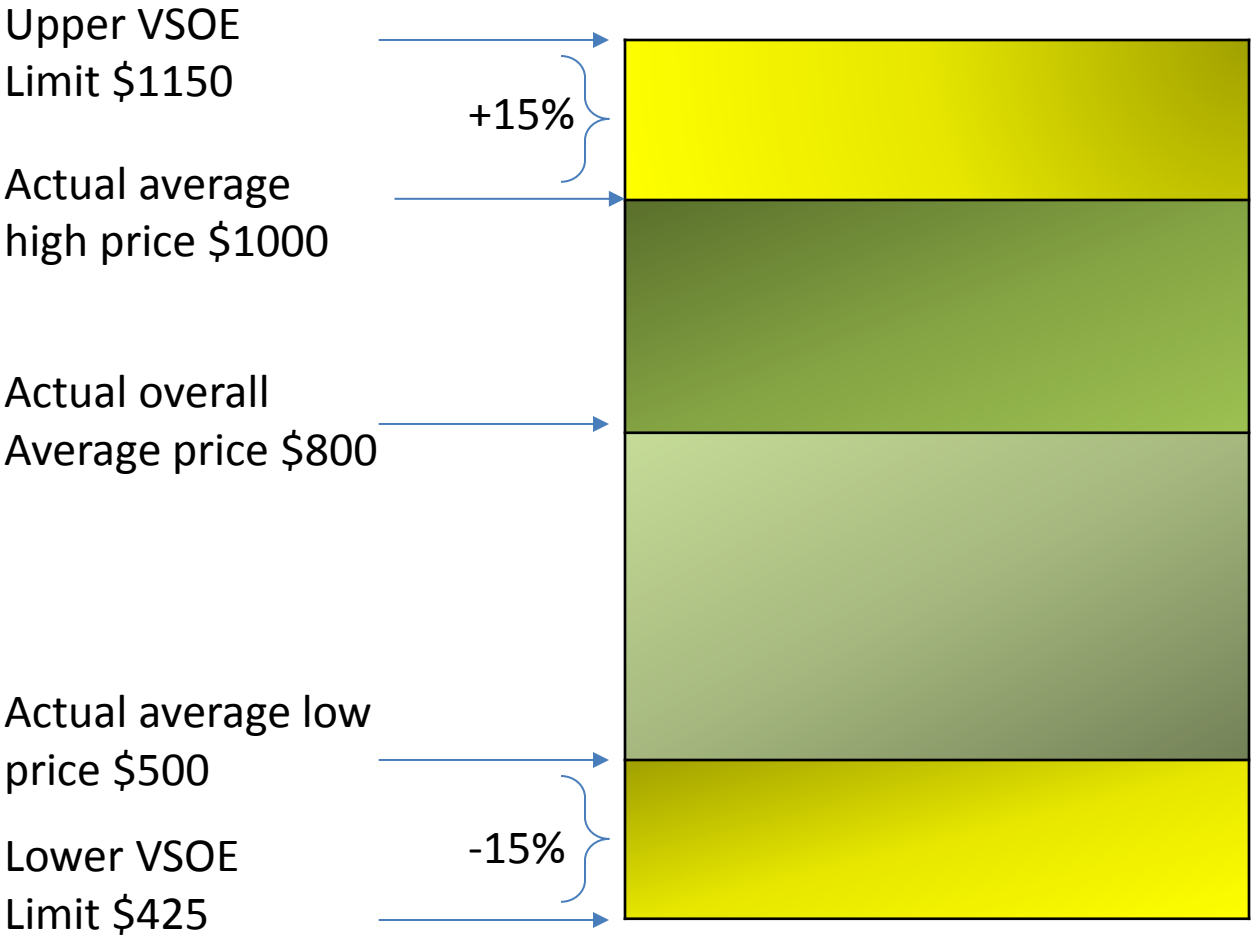
- Revenue of **PUBLICLY TRADED** software companies is closely scrutinized by the SEC. (*Rule change forthcoming in 2017*)
- Private companies have no basis to use rev rec. as an excuse to avoid discounting.
- For a publicly traded Software Publisher to recognize revenue immediately upon sale *(and not ratably over time)* certain conditions must be met.
  - Signed contract or formal agreement, with a fixed price, non-refundable provisions, and a high probability of collection.
  - Software must be delivered in usable format, accessible to end user.
  - No significant modifications required, no promise of future functionality, no promise of future products, and no deal-altering contingencies.
  - Software performance guarantee limited to standard warranty and acceptance that software will perform according to Publisher's documentation.
  - Implementation and consulting service performance cannot be tied to acceptance, return, or payment for the software licenses.

Revenue Recognition – a Frequently Used Objection

- VSOE – Vendor Specific Objective Evidence – is a revenue recognition mechanism to prevent inconsistent pricing and discounting from favoring certain classes of revenue.
  - *Funneling revenue to software licenses by giving disproportionately high discounts on services or maintenance can make the company look more valuable than it is.*
- Why should you care?
  - *Rev rec is often used as a negotiating tactic to say no to requests for discounts and certain Ts and Cs.*
  - *Very few software sales people or executives understand VSOE.*
  - *It is often a smokescreen.*
- Two easy responses
  - *Ask for specifics about how your discount or term violates VSOE.*
  - *Ask why your deal can't be one of the 20% permitted to be outside of VSOE range.*

VSOE – Vendor Specific Objective Evidence

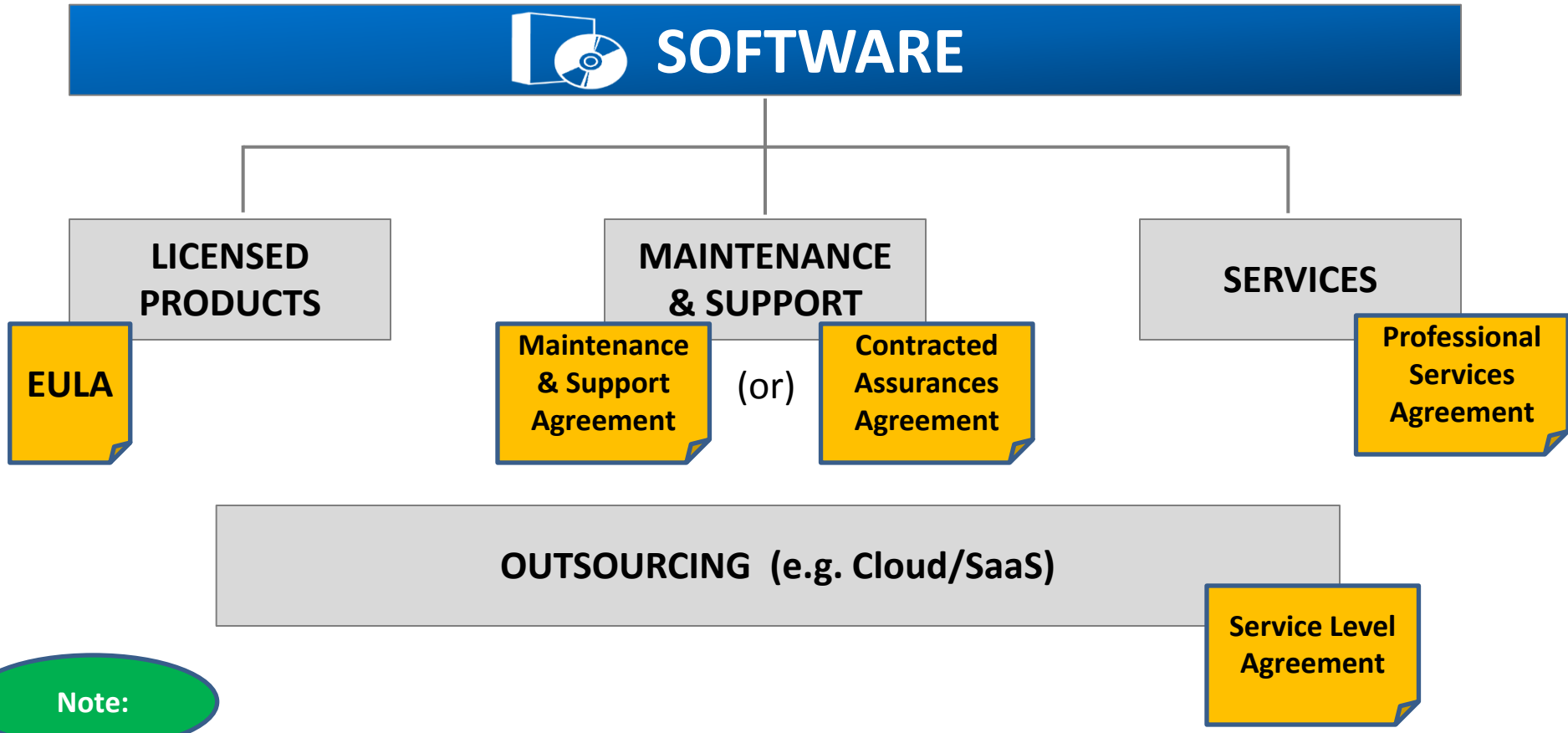
General Rule – 80% of the time, the price must be within a band that is plus or minus 15% of the average price range for a product



4. Products & Services
(What are you Buying?)

Prepared by DoD ESI | 2015

Products & Services: SOFTWARE CORE COMPONENTS & RELEVANT AGREEMENTS



The type of product you are buying impacts the agreement structure and terms

Products & Services: Product Categories - Overview

COTS LICENSED PRODUCTS*

SYSTEMS

- Operating Systems
  - Windows
  - Linux
- Utility Programs

PROGRAMMING & TOOLS

- Software Development Kits
  - Oracle Fusion Middleware
  - IBM WebSphere
  - JBoss Enterprise Open Source
- Middleware

BUSINESS APPLICATIONS

- Enterprise / Complex
  - Some Assembly Required
  - Microsoft Office
  - SAP Logistics
  - Siebel CRM
- Shrink Wrap / Ready to Use

Note: ratio of money spent 1-4 vs. 1-15

DATABASES

- Processing
  - Oracle
  - Microsoft SQL Server
  - IBM DB2
  - Sybase (SAP)
- Storage

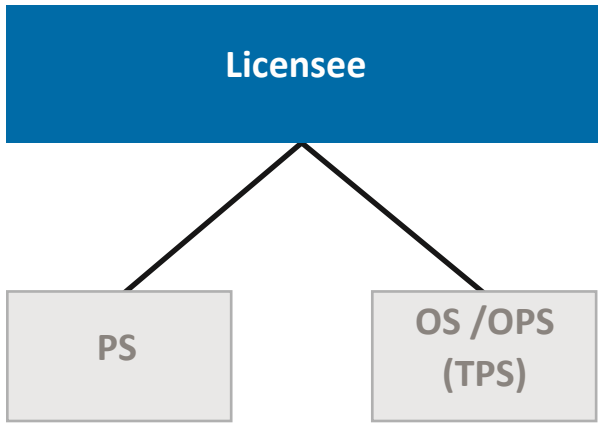
Open Source

* Software can also be custom built. The focus of this course is the COTS licensed software.

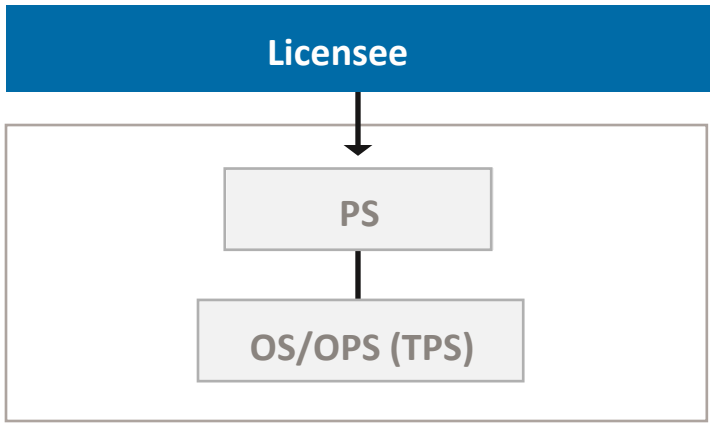
Open Source and Other Proprietary Software Licenses

- Open Source (OS) and Other Proprietary Software (OPS) (together referred to as Third Party Software - TPS) can be obtained with the primary software application (PS) being licensed in two ways:
  - *As separately licensed software, e.g., Mozilla Firefox (OS) or Oracle Database (TPS)*
  - *As embedded software*
- The embedded software case creates potential liability for the Government.

Separately licensed



Embedded software



Open Source Code and Other Proprietary Software

- Why Embedded Software Matters to You
  - Today most proprietary software includes embedded OS and some has embedded OPS. (OS and OPS are referred to collectively as TPS for convenience).
  - The Primary Software (PS) IP owner (Publisher) made the choice to embed TPS in its product.
  - In some cases, the PS Publisher doesn't know how much OS or OPS is in its PS.
  - Most PS Publishers do not address the issue of TPS in their EULAs. Those who do address it usually try to pass the risks associated with TPS to the Government.
  - The PS Publisher should retain the risks associated with the decision to include TPS (or the lack of attention to it).
- A Few Issues that Must be Addressed
  - Improperly licensed TPS could lead to third party claims of infringement.
  - Improperly licensed TPS could lead to third party claims for license fees.
  - The Government generally has no recourse with TPS Publishers for product defects.
  - OS carries a risk of little or no support and its licenses usually require a license holder to share enhancements.

Open Source & Other Proprietary Software Clauses

- ESI recommended Clauses to Address TPS Concerns
  - *Make sure the EULA includes the following covenants from the Publisher:*
    - **Disclosure** of all third party software (TPS) including Open Source.
    - Publisher has the **right to use** the TPS in the way it has been used with Publisher's IP.
    - PS Publisher **indemnifies** the Government against additional licenses or license fees required to use the PS or TPS.
    - Publisher **warrants** performance of its IP and the TPS included with its IP.
    - The Government assumes **no obligation to share enhancements** or derivative works of PS or TPS.

ESI White Paper Available

- Other OS Considerations
  - *No Maintenance and Support Infrastructure*
    - Since Open Source is collaboratively developed and peer reviewed, there might be no formal infrastructure for providing fixes, patches, enhancements and updates.
  - *"Encapsulation" can be used to isolate Open Source code from copyrighted IP.*

4. Products & Services
Software Source Code Escrow

Prepared by DoD ESI | 2015

Overview

KEY RECAP POINTS

- Source Code is the _____ readable form of software written by the _____. _____ Code is machine readable form.
- Buyers don't get the _____ code when licensing COTS software.

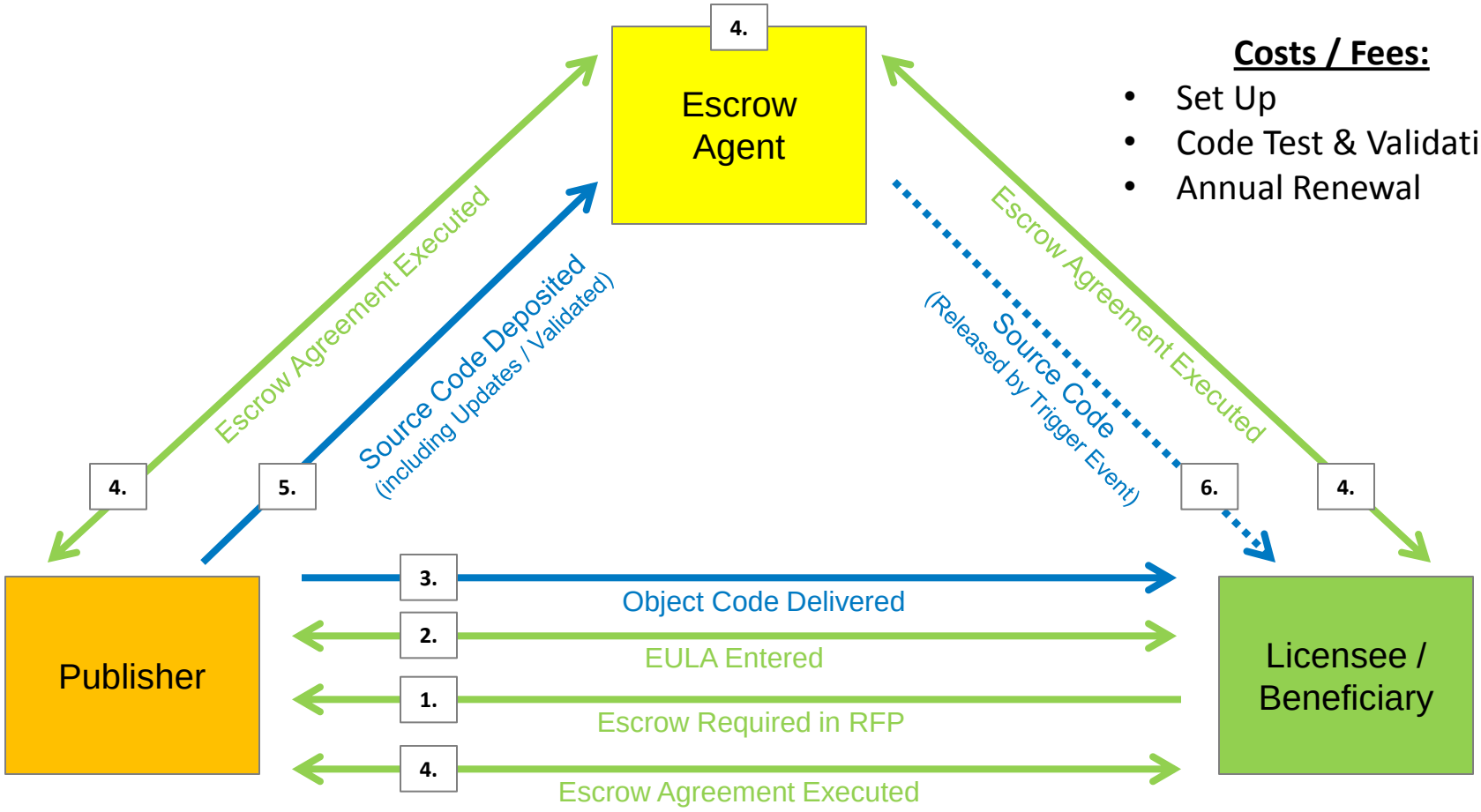
WHEN SOURCE CODE IS NEEDED BY BUYERS

- Under certain circumstances - e.g., Publisher goes into bankruptcy or stops maintaining the software.

ONE WAY TO GAIN ACCESS TO THE SOURCE CODE

- An escrow agreement with a neutral third party gives Publishers and buyers assurance that their respective interests are protected.
- The escrow agreement specifies the events which could trigger the release of the Source Code to the buyer.

Source Code Escrow—Balancing Interests



Costs / Fees:

- Set Up
- Code Test & Validation
- Annual Renewal

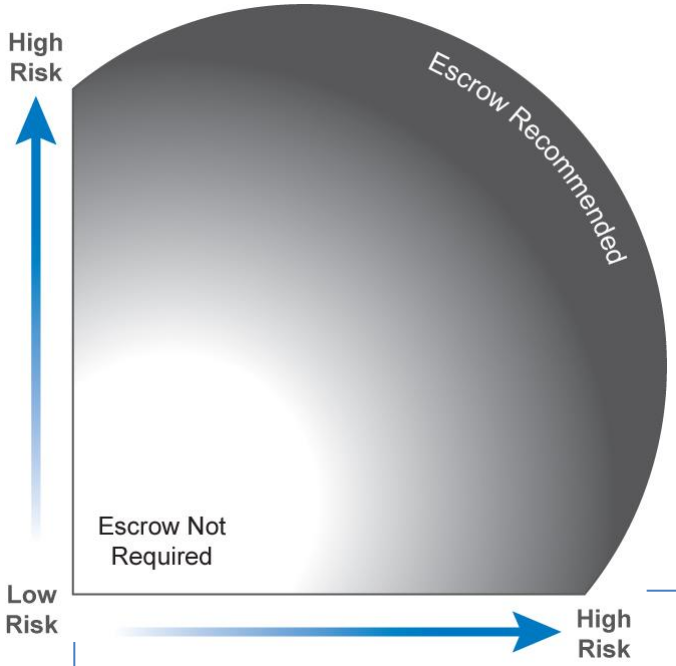
The licensee's right to the released Source Code is usually limited to a right to use it to maintain and enhance their production system. Note: Different versions of Escrow Agreements exist. Ensure terms are beneficial to buyers/licensees.

Source Code Escrow Considerations

Software Type & Mission

- < 2 Years in the market
- Mission Critical
- Low market share
- Low number of installations

- > 5 years in the market
- Not mission critical
- High market share
- Large number of installations



Publisher Longevity & Stability

>5 years…….	Years in Business	……..< 2 years
>15% of Sales….	Net Income	.....< 5% of sales
High……..……	Earnings per Share	…… Low
Moderate…….	Price-to-Earnings Ratio	……..… High
High……	D&B Rating	…….. Low
Balanced.....	License v. Service Revenue	….. High license v. service

4. Products and Services: Maintenance & Support

Prepared by DoD ESI | 2015

Maintenance & Support – Basic Elements

Maintenance

Designed to provide customer access to the ongoing enhancements and fixes created by the Publisher

- Fixes & Patches to Bugs (1.0.1) - *(Publisher develops; customer applies.)*
- Updates (1.1)
- Upgrade / New Release / Version (2.0)

Maintenance fees are used by Publishers to fund development of fixes and new releases.

Support Services

Established to report software deficiencies or malfunctions and to receive corrections or fixes.

- Support Levels and Process (Who receives, diagnoses, and fixes problems?)
- Issue Severity Levels
- Response Times

Most Publishers offer increasing levels of support at increasing prices.

Software Versions – Nomenclature & Numbering

Nomenclature	Description	Numbering Scheme
Upgrade /New Version	New functionality and improved features. *(Always ensure that a new version is covered under annual maintenance, at no charge.)*	Usually represented by a new number in front of the decimal point. *(i.e. 3.0 becomes 4.0)*
Update	A release with enhanced features and consolidation of all prior bug fixes.	Often represented by a change one place to the right of the decimal point. *(i.e. 4.1 becomes 4.2)*
Bug Fix/Maintenance Release/Patch	Corrects issues, errors, and bugs in previous release of the same version.	Often represented by a change two decimal places to the right of the version number. *(i.e. 4.2.1 becomes 4.2.2)*

Note: EULA should address: Reinstatement fees, version lock, and new product license fees

4. Products and Services:
Outsourcing / Cloud and Software as a Service (SaaS)

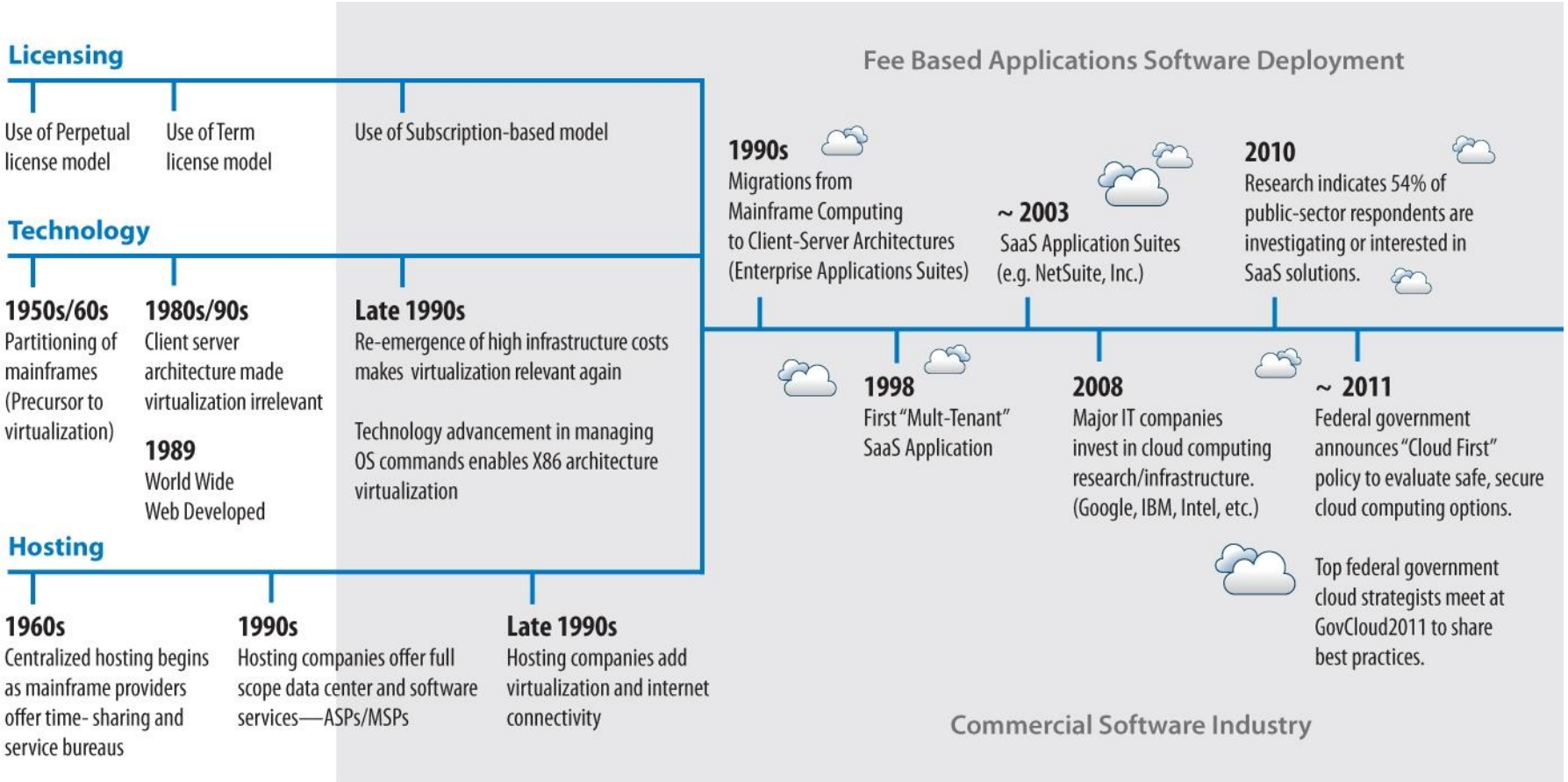
Prepared by DoD ESI | 2015

Excerpts from Full-Day Workshop on Cloud and SaaS

Outsourcing

Hosting / ASP / MSP Models	Cloud	Iaas, PaaS, SaaS

Timeline to Cloud/SaaS



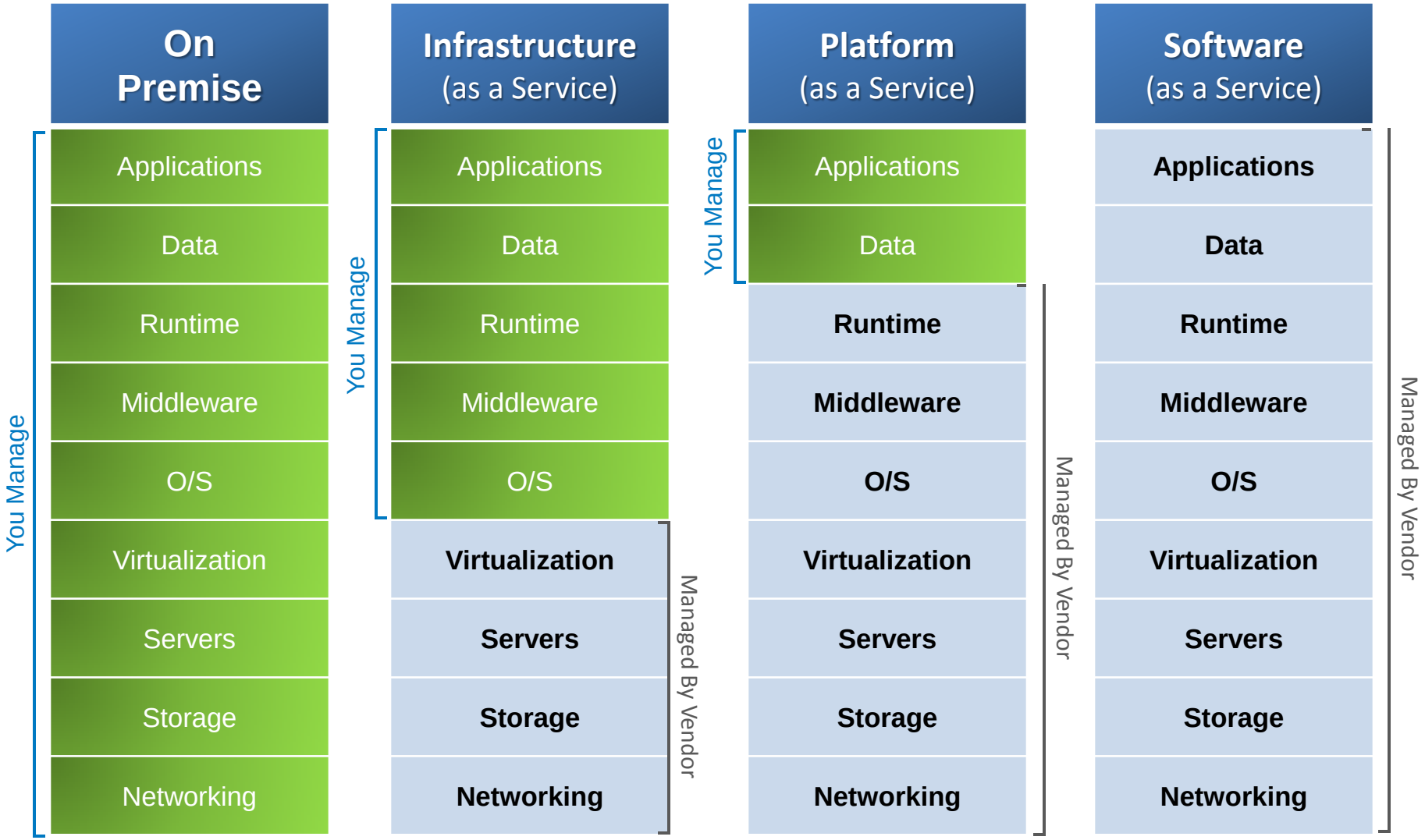
Cloud Deployment Models

Public	Community	Hybrid	Private
Off premise at provider	On or off premise	On or off premise	On or off premise
General public	Multiple, related organizations	Determined by each cloud	Limited to a single organization
Users' concerns and purposes vary	Users share the same concerns	Users' concerns and purposes vary	Used by various business units

What Does it Mean to Deploy to the Cloud?

- True or False—cloud computing and SaaS are synonymous.
- True or False—a perpetual license can be deployed to the cloud.
- Cloud computing requires which of the following?
  - *Internet connections*
  - *Virtualization*
  - *SaaS licenses*
  - *Remote data storage*
  - *A special operating system*

The Cloud's Impact on Licensing



Licensing Considerations – Perpetual versus SaaS

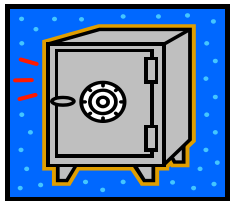
Factor	Perpetual License	SaaS License
Payment	One-time payment at delivery	Usually subscription based
License Duration	Into perpetuity – a permanent fixture	Use while subscription is current – like a utility
Physical Custody	Yes	No
Customizations	At Licensee discretion	At Licensor discretion
Security	Depends on Licensee or subcontractor	Depends on Licensor skills
Data Ownership	Licensee owns data & has custody & control	Licensee owns data but may not have custody or control
SLAs	Vendor response to issues only	Vendor response to issues and to system availability
Hosting Location	Usually on premises but can be outsourced	Usually off premises
Upgrades	Applied at Licensee's discretion	Applied at Licensor's discretion

Why Use the Cloud?

- Aside from the OMB mandate, what are key business reasons for deploying to the cloud?

Cost Reduction

Greater Mobility



Heightened Security

Speed & Flexibility

Easier Collaboration

- *Each of these factors may be valid, but we should examine them in detail.*

Pricing Comparison Example – SaaS Versus Perpetual

Perpetual Price	Technology Stack	SaaS Price	Issues
$1 million	Application	$250K per year	What happens after year 4?
$ 150K per year	Data Management	$100K per year	There are potential savings in each of these categories with SaaS because of shared resources and virtualization BUT 1. Does the Government already own any of these resources? 2. Are they available for this application? 3. If so, will those resources go away or be deployed for another application? 4. If not, will the Government pay twice? 5. What happens when there are multiple SaaS licenses with multiple vendors ?
$ 200K	Runtime	$ 150K	
$ 100K	Middleware	$ 75K	
$ 50K	O/S	$ 40K	
$ 50K	Virtualization	$ 40K	
$ 300K	Servers	$ 75K	
$ 200K	Storage	$ 100K	
$ 100K allocated per year	Networking	$75K	
$100K allocated per year	Facilities	$75K	

Other Factors to Consider About Cloud Benefits

- Flexibility
  - *Switching SaaS vendors could be less costly than switching perpetual vendors, but…*
    - …would it be as easy to switch email providers as it would be to switch ERP SaaS vendors?
  - *What about customizations?*
  - *What about control over the timing of upgrades?*
  - *Is virtualization limited to the cloud?*
  - *How do you put a price on flexibility gained or lost?*

Other Factors to Consider About Cloud Benefits

- Heightened Security
  - *Even if all infrastructure is outsourced, does it make sense to outsource data security?*
  - *Is data outside of the Government's custody as secure as data that is in the Government's custody?*
  - *What about security of the Vendor's premises? What about their supply chain?*
- Analytical Approaches
  - *A consistent approach to analyzing prices and internal costs is a mandatory prerequisite to gauging cost savings.*
  - *Should savings be measured on a deal basis or a collective basis?*

Key Cloud/SaaS License Considerations

- SLAs
  - *Dependence on the Vendor makes SLA clauses extremely important*
  - *Ensure measureable performance standards for system up time and issue response are clear.*
- Upgrades
  - *If the timing of upgrades is important, include the right to delay upgrades at your discretion.*
- Customizations
  - *If you know customizations will be required, ensure there is a clause addressing your right to have customizations in your instance of the software.*
- Some licenses claiming to be SaaS are not true SaaS applications.
  - *One large software Publisher requires customers to download software instead of remotely accessing it – and they require system access for monitoring.*
- Government funding might impact multi-year subscriptions.
  - *What happens to your SaaS app if year 2 funding disappears?*

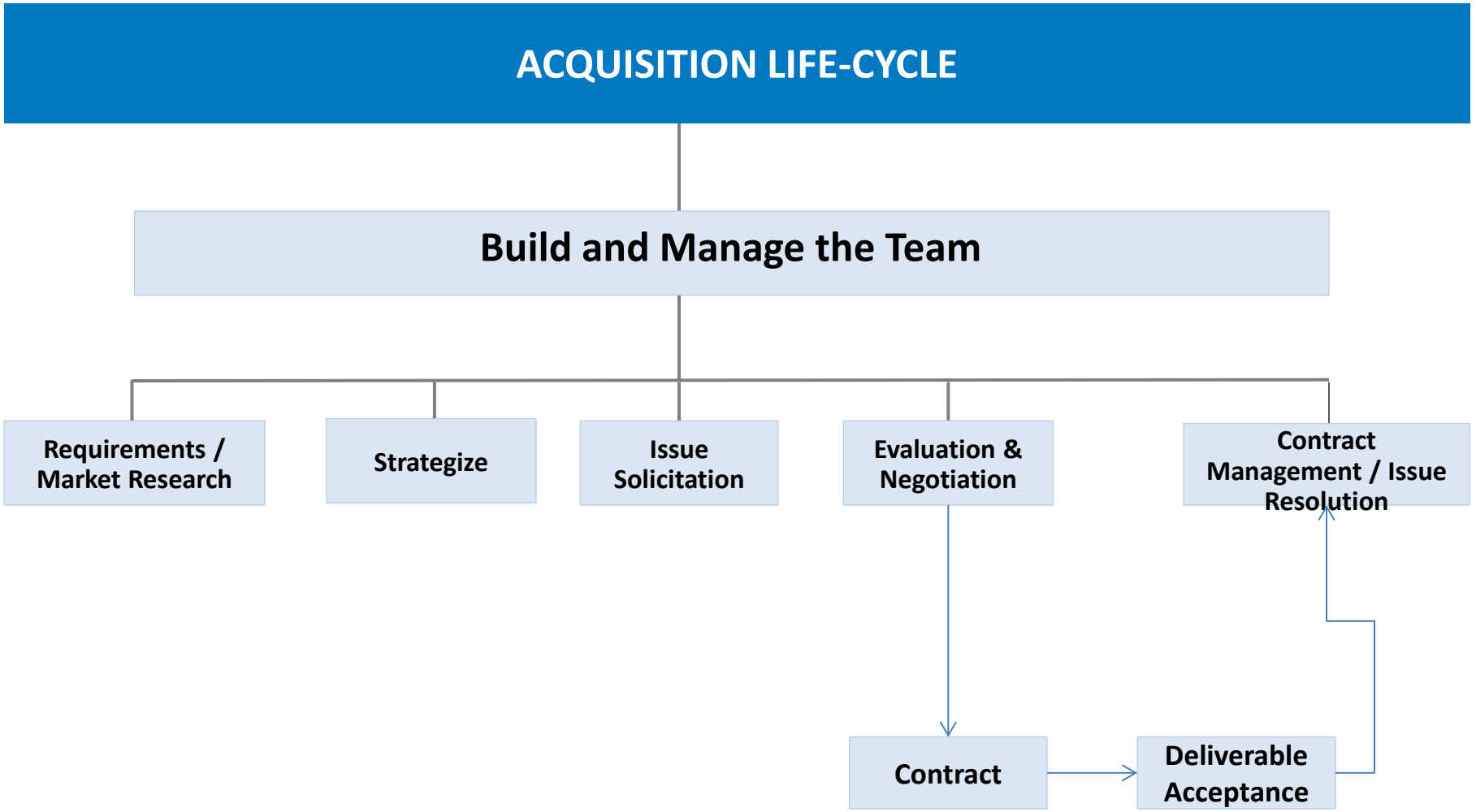
See: *Federal Cloud Compliance Committee* for Recommended Clauses

5. PREPARING FOR THE ACQUISITION
Building a Team; Creating a Negotiating Strategy.

Prepared by DoD ESI | 2015

Excerpts from Full-Day Workshop on Strategic Negotiations

Acquisition Process Flow

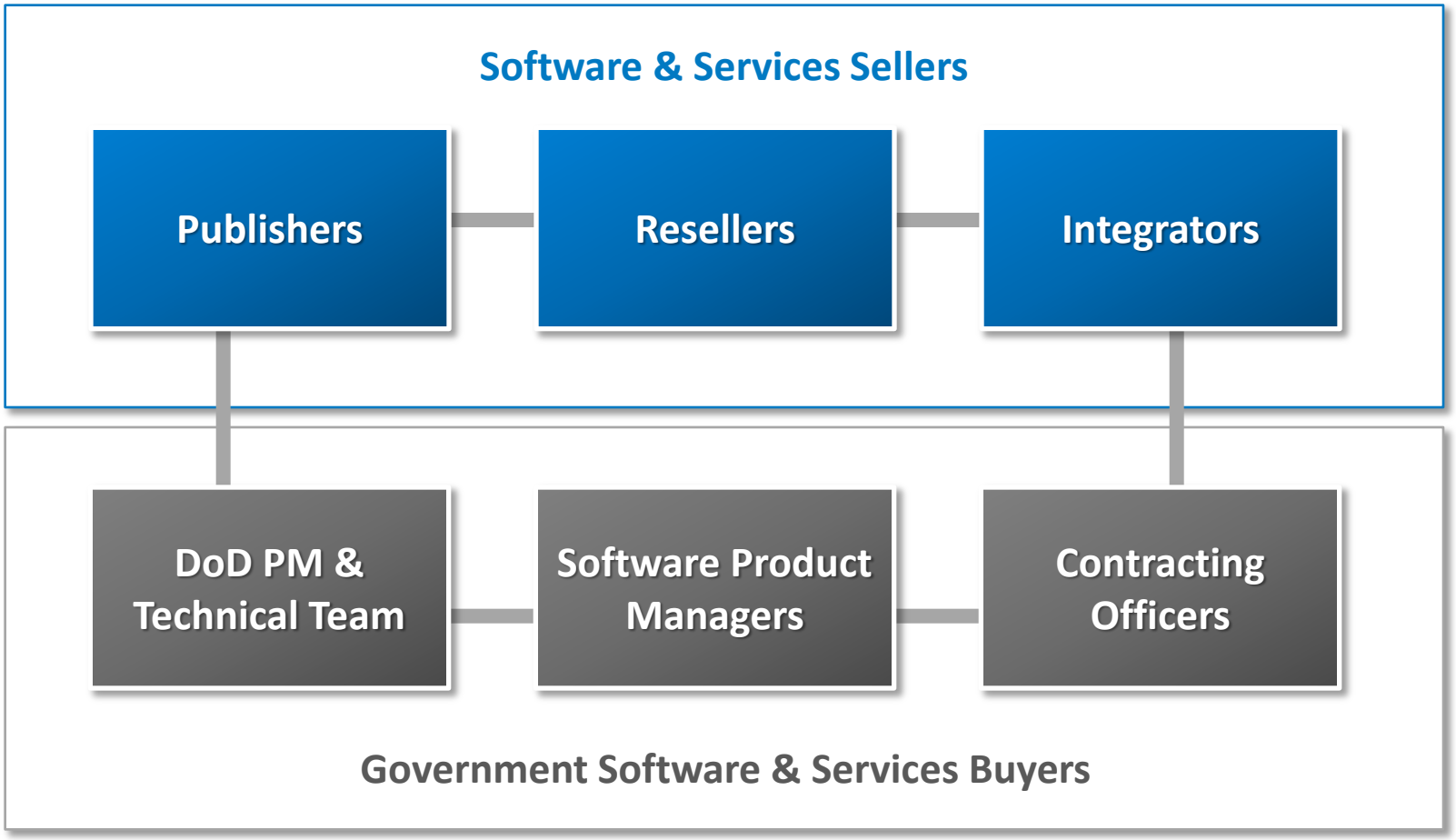


5.1 BUILDING THE TEAM

Prepared by DoD ESI | 2015

The Government Team & Their Involvement in the Process

Key Software License Negotiation Players



Sales Process

As Aligned to DoD Acquisition Process

Software Sales Process	DoD Acquisition Process
• Identify Customer Requirement • Provide Product Data • "Sell" the Customer on Products • Determine How Much Customer Can/Will Pay • Identify and Work any $ or Terms Issues • Determine Acquisition Vehicle • Negotiate Price and Ts & Cs • Execute Order • Ensure all Programs Delivered	• Determine Requirement Exists • Gather Data on Requirements Fit and Products • Establish Best Solution for Requirement • Establish Budget and Funding Sources • Establish "Must Have" Ts & Cs and $ Ceiling • Determine Contract to be Used • Negotiate Price and Ts & Cs • Obtain Approvals and Sign Contract Order • Accept Products

Note: There are hundreds of variables in each Process

5.3 PREPARE THE NEGOTIATING STRATEGY

Prepared by DoD ESI | 2015

Excerpts from Full-Day Workshop on Negotiations Strategy

Preparing a Negotiating Strategy

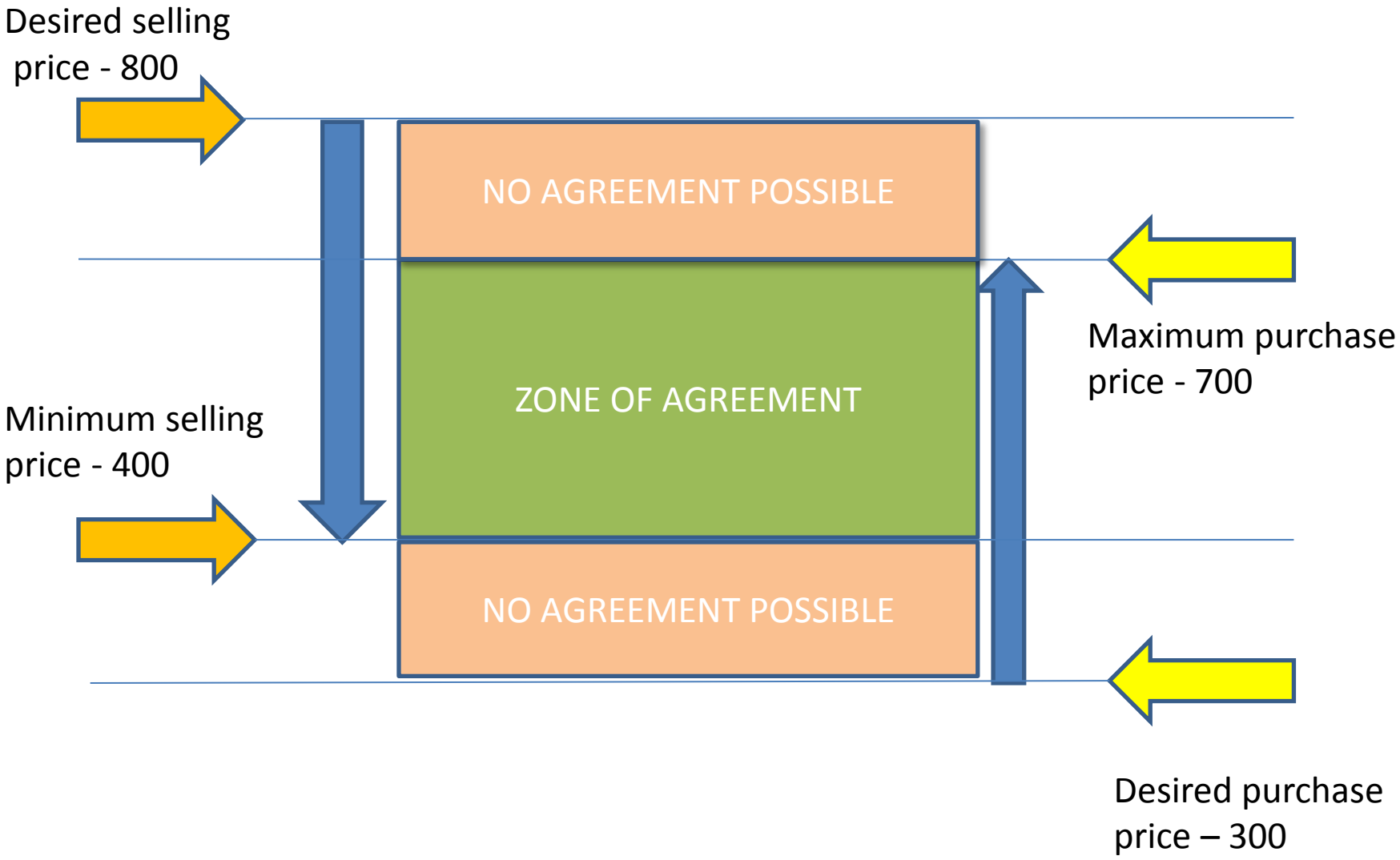
- Evaluate the parties
  - Recurring negotiation versus one-offs
  - Is competition still a factor or has the vendor been selected?
  - Relative strength and leverage of the parties
  - Establishing face-off strategies (roles to be served)
- Establish objectives & alternatives / **Term Sheet**
  - Assign target values (desired outcome – objective) for both qualitative and quantitative issues
  - Create one or two back-up positions for every important issue
    - For example, Ts and Cs might require alternative language
  - Is there a BATNA in case it is needed?
- Identify and prioritize the issues
  - Assuming a commercial transaction, price is only one issue
  - Take a comprehensive view of the issues from the perspective of both parties

Preparing a Negotiating Strategy

- Assessing your strengths and weaknesses
  - How solid is our information?
  - Are there time limits to reach agreement?
  - Are there negotiating limits imposed by law or regulation?
  - Conduct a senior management review
    - This will ensure integrity of the strategy
    - It will also ensure management buy-in

- Find Zones of Agreement
  - Establish a walk away position or Reservation Price for each objective
  - Use the back-up positions to create a zone of potential agreement
  - Prepare strategies for mutual discovery of zones of agreement

Reservation Price and The Zone of Agreement



Executing and Concluding the Negotiation

- Logistics
  - Selecting the venue – the Paris Treaty story
- Presenting desired outcomes
  - Selecting a spokesperson
  - Who goes first – does it really matter?
- Tactics
  - Using conditional agreements to make progress – If I do X will you do Y?
  - Using “intervenors” and “ratifiers”
  - Asking questions for fact-finding
  - Caucusing & Concessions
- Finalizing the agreement
  - Documenting positions and agreements (or tentative agreements)
  - Closing the deal – getting to a final document with signatures

Key Contract Drafting and Construction Principles

- People leave their jobs often – write for the replacement who has to figure out the intent of the original drafters / parties;
- Package documents up for presentation to the Judge or jury in future litigation;
- Use contract template in RFQ/RFP with buyer-focused or project success terms; deviations are to be noted in the proposal / response and used as an evaluation factor; competitive process is the greatest moment of leverage to impose the terms that benefit the buyer (who has the money);
- OR first drive to a term sheet of business terms; agree in principle; add legal terms after business terms are finalized
- Write using plain English;
- When buying deliverables, point to samples to align the parties' expectations and to be used in the acceptance process

Key Contract Drafting and Construction Principles

- No (or minimal) assumptions
- Don’t ignore contradictions in language – resolve them
- Don’t leave in clauses that are irrelevant or not permitted by FAR – take them out or change them
- Make sure you have all documents and reconcile them to each other
- Don’t allow for web links to be referenced that can be changed
- Don’t ignore the boilerplate or assume that it is standard and reasonable language that serves your best interest
- Include recorded and digital items with relevant information or promises (voice mail, email, YouTube videos, product tutorials, testimonials, case studies, social media, etc…)

Recap, Questions and Parking Lot Items